THE EFFECT OF WAR ON THE OPERATION OF STATUTES OF LIMITATION

"THE Effect of War on the Running of the Statute of Limitations" might be deemed a proper topic of international law or of municipal law. It deals with the effect of war, an international relation, upon the operation of a municipal statute. Like many matters treated by writers on international law it combines international and municipal law, and the rules controlling are constantly spoken of as rules of each. The decisions, as will be seen, involve questions of tort, contract, and property right.

The English courts have ruled, as Sir Robert Phillimore states,[1] "that the Statute of Limitations (21 Jac. I., c. 16, § 7) is no bar to a party, whether he be a subject of the realm or a foreigner, who was not in England at the time the cause of action occurred, and who continues resident abroad." This rule has perhaps tended to prevent the question of the effect of foreign war on the running of the Statute of Limitations being litigated in the courts of England, but not as concerned her civil wars.

Thus in *Hall* v. *Wybourn*[2] the court says (of the Statute of Limitations):

> "In one *Bynton's* case, it was held by Bridgman, C. J., that though the courts of justice were shut up so as no original could be filed, yet this statute would bar the action because the statute is general, and must work upon all cases which are not exempted by the exception."

And in *Prideaux* v. *Webber*[3] the defendant pleaded the Statute of Limitations to an action of trespass for assault and battery and imprisonment. The plaintiff replying "that certain rebels had usurped the government and that none of the King's Courts were open," it was adjudged for the defendant. "And the reason they gave that the Statute of Limitations was a good bar, (be it so, as it was pleaded, that the Courts were not open) was, because there

[1] 4 COMMENTARIES ON INTERNATIONAL LAW, p. 723.
[2] 2 Salk. 420 (1689).
[3] 1 Levinz 31 (1661).

is not any exception in the act of such a case." This case is one sounding in tort.

In *Lee* v. *Rogers*,[4] the court says:

"And in Hillary term the 15th of Car. II, in the Common Pleas, between Sir George Bremion and Sir John Evelyn, on a promise made in 1646, the defendant pleaded the Statute of Limitations; to which the plaintiff replied, that the defendant was a member of the House of Commons till 1648, and that then the government was usurped, and no courts erect; and that he brought his action as soon as the courts were erected by the King's restoration. And on demurrer it was adjudged, (as I heard) . . . Thirdly, That privilege of Parliament, nor the courts not being open, are not any excuse against the Statute of Limitations not being excepted out of the Statute."

Here the rule is decided as to an action on contract.

The stop to the running of the statute in these cases, which was claimed but denied, is due to the fact that the courts were closed, not to the fact that parties were divided by the line of war.

The whole subject was reviewed and the doctrine that the running of the statute was not hindered by a state of war was affirmed in *Beckford* v. *Wade*.[5] Sir William Grant, M. R., there discussing the subject, says (p. 93):

"A very strong case is put, that of the Courts of Justice being shut up in time of war, so that no original could be sued out; and yet it has been given as the opinion of learned Judges, that even in that case the Statute would continue to run. In the case of *Hall* v. *Wybourn* (2 Salk. 420) and *Aubry* v. *Fortesque* (10 Mod. 206) it is stated to have been held by Bridgman, Chief Justice, that though the Courts of Justice were shut up, so as no original could be filed, yet this statute would bar the action; because the statute is general and must work upon all cases, which are not exempt by the exception; and in 10th Modern this resolution is said to have been often approved by Lord Chief Justice Holt."[6]

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[4] 1 Levinz 111 (1663).

[5] 17 Ves. Jr. 87 (1810).

[6] In the modern case of Musurus Bey *v.* Gadban, [1894] 2 Q. B. 352, the Court of Appeal held that the Statute of Limitations did not run in favor of His Excellency Musurus Pacha, Turkish Ambassador, while he was accredited as such to the sovereign of Great Britain, or during such reasonable time thereafter as he was detained by closing his business and preparing to leave England. In this case the narrower rule of the older cases, that no exception can be introduced into the statute except as therein stated, however reasonable, seems not to have controlled.

This passage is by way of argument and *dictum*.

In the United States the matter seems to have been much more extensively considered and adjudicated than in Great Britain, both as to the effect of the closing of the courts during war and the effect of the separation of the parties by the line of war.

To begin with the earliest case observed, in —— v. *Lewis*,[7] the United States Circuit Court in 1805 decided that the Statute of Limitations was suspended during the continuance of the war as to alien enemies disqualified to sue in our courts. This rule is applied to a British adherent. No reference is made to our treaty with Great Britain, which might well have governed the case. This seems the beginning of a rule differing from that of the English courts.

Shortly after the war of 1812 between Great Britain and the United States the question came before the Constitutional Court of South Carolina, in *Wall* v. *Robson*.[8] This was a case of summary process on a bill drawn by Nesbit in favor of Robson (the plaintiff), a British subject, on Wall, an American citizen, residing in Charleston and accepted by him. The bill was dated March 2, 1812, payable at thirty days on sight, accepted on the 25th of April following, and protested for non-payment May 28, 1812. On June 18, 1812, war was declared by the United States against Great Britain and continued two years, six months, and six days. If this period were excluded, the Statute of Limitations had not run. The trial judge held it should be so excluded. This was affirmed by the Constitutional Court of South Carolina in an extended opinion by Mr. Justice Bay. He shows that war does not deprive an individual in an enemy's country of his rights, but merely suspends them. That there is no default on the part of creditors who cannot enforce a claim in case of war, and that law will not penalize such enforced delay. It will be observed that this was an action on a contract. This case seems to announce fully the rule that has been ever since generally adhered to in the United States. It turned, however, on the separation of the parties by the line of war and the inability of an alien enemy to sue, not on the closing of the courts.

Many cases involving the principle arose, as was to be expected, at the close of the war with the Southern Confederacy. The people of the United States had been divided by a great civil war lasting

[7] 1 Brunner, Col. Cas. 27, 15 Fed. Cas., No. 8,315 (1805).

[8] 2 N. & McC. (S. C.) 498 (1820).

for years, severing many millions of countrymen between whom the most extended and intimate commercial relations existed. Intercourse across the line of war was forbidden and became penal. The federal courts were closed in Confederate territory. Rules derived from each of these circumstances were invoked to prevent the running of the Statute of Limitations and the accrual of interest upon obligations whose performance was thus frustrated by no fault of the parties thereto. The writer contributed to the Law Quarterly Review of London for July, 1909, an article of nineteen pages, in which it is believed to have been shown that the rule was overwhelmingly settled in the United States that interest did not run during such period as the parties to an obligation were separated by the line of war. The United States cases seem to be equally explicit to like effect that the Statute of Limitations ceases to run when the parties to an obligation are separated by the line of war, or when the courts to which they must apply are unable to sit in consequence of war.

In *Jackson Ins. Co.* v. *Stewart*[9] the action was on a bill of exchange drawn in Tennessee in 1861 on a drawee in Maryland. It was held that the Statute of Limitations did not run during the period in which war was flagrant between the states mentioned. Speaking of the suspension of the right to sue, the court says (p. 312):

"This suspension, being by the exercise of the paramount authority of the government, cannot be held to work a forfeiture of the plaintiff's cause of action, but his right to sue, suspended by the war, revived when it ceased."

The opinion cites no authorities.

Perhaps the most complete and authoritative case in the United States upon the subject is *Hanger* v. *Abbott*.[10] Abbott of New Hampshire sued Hanger of Arkansas in *assumpsit*. The question was whether the time while the courts of Arkansas were closed by the rebellion was to be excluded in computing the time fixed for limitation of action by the Arkansas statute, there being no exception or exemption stated in the statute. Mr. Justice Clifford gave the opinion of the court.

[9] 1 Hughes 310, 13 Fed. Cas., No. 7,152 (1866).

[10] 6 Wall. (U. S.) 532; Scott's Cases on International Law, p. 500 (1867).

His reasoning is that debts existing prior to war (between enemies) are not annulled, but the remedy merely is suspended as a necessary result of the inability of an alien enemy to sue in courts; that though the Statute of James the First enumerated specific exceptions which did not include the one under discussion, the omission was due to the fact that debts due alien enemies were confiscated for more than a century after that statute was enacted, and therefore law-makers, regarding such debts as annulled by war, never thought of making provision for their collection on the restoration of peace. The court regarded the old English decisions [11] as of little weight, even if correctly reported, on the ground that they were made before the rule of international law was acknowledged, that war only suspends debts due an enemy, and that peace had the effect to restore the remedy. It was held, accordingly, that the Statute of Limitations did not run while the creditor was incapable of suing, owing to the state of war. The inability to sue seems to rest both on the closing of the courts and suspension of intercourse.

The doctrine of *Hanger* v. *Abbott* has been followed in a series of interesting cases. The first of these is *The Protector*,[12] where the time of the beginning and termination of the War of the Rebellion as to acts of limitation was held to be determined by public acts of the political department. The Proclamation of Blockade by the President as to certain states was held to determine the commencement as to such states, and the Proclamation of Termination as to certain states by the President to determine the close as to such states. Alabama was named in the first Proclamation of Blockade and the first Proclamation of Termination of War. An appeal, filed May 17, 1871, from a decree of April 5, 1861, of a United States Circuit Court for Alabama to the Supreme Court at Washington was dismissed, more than five years having elapsed between the date of the decree and the appeal, after subtracting the time when the war was flagrant. The opinion of Chief Justice Chase is brief and unsatisfactory, but evidently applies the broad principle that the Statute of Limitations cannot run when a state of war prevents the doing of the acts necessary to prevent its running.

[11] Hall *v.* Wybourn, 2 Salk. 420 (1689); Prideaux *v.* Webber, 1 Levinz 31 (1661); Lee *v.* Rogers, 1 Levinz 111 (1663).

[12] 12 Wall. (U. S.) 700 (1871).

Shortly thereafter, in *Semmes* v. *Hartford Insurance Co.*,[13] the Supreme Court decided that though the rule was established that a Statute of Limitations ceased to run when war prevented the doing of the acts required to stay its running, yet the rule was wholly otherwise where, under an insurance policy, certain acts were required by its terms within twelve months after loss. The war having frustrated the acts at the time specified, the stipulation therefore was held a condition from which the plaintiff was relieved by the war making performance impossible. The plaintiff was therefore wholly relieved therefrom and not bound to do the acts within a twelvemonth after peace, the general Statutes of Limitations being the only limits left. The opinion is by Mr. Justice Miller, considered as able as any member of the bench at that time or since.

The third case is *Brown* v. *Hiatts*.[14] This was a bill of foreclosure. The mortgage was given in Northern territory and secured on Northern land (in the State of Kansas) to Brown, a resident of Virginia. After loaning the money and taking the security in Kansas, Brown returned to Virginia and there remained in territory declared to be in insurrection. It was claimed the action was barred by a Statute of Limitations of Kansas. Mr. Justice Field, holding that the statute did not run, in the course of his opinion said (p. 184):

"Statutes of Limitation, in fixing a period within which rights of action must be asserted, proceed upon the principle that the courts of the country where the person to be prosecuted resides, or the property to be reached is situated, are open during the prescribed period to the suitor. The principle of public law which closes the courts of a country to a public enemy during war, renders compliance by him with such a statute impossible. As is well said in the recent case of *Semmes* v. *Hartford Insurance Co.* (13 Wall. 160), 'The law imposes the limitation and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other.'"[15]

It will be observed that the exclusion of the alien enemy from the court is the basis of the decision.

The rule was settled that an alien enemy might be sued even

[13] 13 Wall. (U. S.) 158 (1871).

[14] 15 Wall. (U. S.) 177 (1872).

[15] See also Bird *v.* Bank, 93 U. S. 96 (1876).

though he could not have a right to bring suit in the courts of the hostile nation. *McVeigh* v. *United States*.[16] This was there held in a proceeding for forfeiture of property under an act of Congress directed against those aiding rebellion, and it was held that the owner of property sought to be condemned is entitled to appear and contest the charges, though, when proceedings were brought and his answer filed, a resident within the enemy's lines and an enemy. The court holds (p. 267) that the liability to be sued carries with it the right to use all the means and appliances of defence, quoting from Bacon's Abridgment (title Alien, D), "For as an alien may be sued at law and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery." In *University* v. *Finch*[17] Mr. Justice Miller, pointing out the limitations of this decision, said (p. 110):

"That case laid down the proposition that when a citizen of a state adhering during that war to the national cause brought suit afterwards against a citizen residing during the war within the limits of an insurrectionary state, the period during which the plaintiff was prevented from suing by the state of hostilities should be deducted from the time necessary to bar the action under the Statute of Limitations. It decided nothing more than this. It did not decide that a similar rule was applicable in a suit brought by the latter against the former."

The doctrine thus seems well settled in American law that where the parties are divided by the lines of war the statute does not run. But where the parties are citizens of the same power, in which the courts are closed, the authorities do not display this unanimity. The later and prevailing decisions, however, hold that the Statute of Limitations is suspended even in suits between persons of the same power, where war has closed all lawful courts. Thus in *Adger* v. *Alston*,[18] in a suit between citizens of South Carolina and Louisiana, both states adhering to the Confederacy, the statute was held not to run while war was flagrant.

Batesville Institute v. *Kauffman*[19] applied the rule to prevent the running of the Statute of Limitations as to a judgment lien on real estate, where, owing to the war, judicial proceedings in the courts of the United States were suspended in the state where the land lay, the location of the parties not being considered.

[16] 11 Wall. (U. S.) 259 (1870).
[17] 18 Wall. (U. S.) 106 (1873).
[18] 15 Wall. (U. S.) 555 (1872).
[19] 18 Wall. (U. S.) 151 (1873).

And in *Ross* v. *Jones* [20] the court held that it had been repeatedly decided that during the Civil War the courts of the United States in the insurrectionary states were closed, and that the Statute of Limitations did not run against suitors having a right to sue in the federal courts. That therefore the rule "applied to suits between persons in different states of the late so-called Confederate States of America, as much as to suits between citizens of the North, which remained loyal, and citizens of the so-called Confederate States, with which they were at war." [21]

Turning to the decisions of the state courts, it will be observed that in general they support the federal authorities as to the cessation of the running of the Statute of Limitations during war.[22]

The bearing of a factor of international law on the problem remains to be considered. By sub. h, article 23, of the Convention of The Hague of 1907, it is especially forbidden "To declare abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party." Thus a "hostile" is to be heard in the courts of his enemy if he can lawfully get there, and it has

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[20] 22 Wall. (U. S.) 576 (1874).

[21] See Cross *v.* Sabin, 13 Fed. 308 (1882).

[22] Thus Bennett *v.* Worthington, 24 Ark. 487 (1866), cites, approves, and follows the rule of the early English cases above, except as it was modified by statute in Arkansas. But this view was shortly overruled and the federal decisions followed in Metropolitan Bank *v.* Gordon, 28 Ark. 115 (1872), and this later doctrine was adhered to in Mayo *v.* Cartwright, 30 Ark. 407 (1875). Williamson *v.* McCrary, 33 Ark. 470 (1878), applied like rules to a statute of non-claim.

In Mixer *v.* Sibley, 53 Ill. 61 (1869), the Supreme Court of Illinois decided that the rules above considered would not prevent the maintenance of an action *in rem* by a plaintiff domiciled in United States territory to enforce a claim against a debtor within the territory of the Confederacy, since such suit required no illegal or "*locomotive intercourse*" across the line of war.

In Perkins *v.* Rogers, 35 Ind. 124 (1871), the suspension of the statute was fully applied. A plaintiff in Louisiana bringing suit against a defendant in Indiana was held exempt from the operation of the Statute of Limitations, even though New Orleans (where he was domiciled) was for a part of the time occupied by federal troops, that not removing his incapacity to sue in a Northern state, he being still an enemy, whatever his personal sentiments.

Selden *v.* Preston, 11 Bush (Ky.) 191 (1874), a suit on an obligation for $24,000, fully affirms and follows the federal rule as above, and holds that a state statute providing that the time when plaintiff is a citizen of a country at war with the United States is not to be computed as a part of the period limited for the commencement of the action, is "but a declaration of what the law was prior to the enactment of the statute and the exception existed as well without as with it."

For other decisions by state courts, see WOOD, LIMITATIONS, § 6.

been suggested [23] that this provision abolished rules like those we are discussing. It is submitted that the absolute and rigorous necessity of non-intercourse across the line of war and the rule of law therefor is in no way affected by the above Convention. It enlarges the rights only of hostiles lawfully within the territory of the other belligerent or possibly in neutral territory.[24]

When the parties are separated by the line of war, therefore, the rule as to the Statute of Limitations not running must still apply. Access to the court by an enemy is not denied by the court, but prevented by the requirement of non-intercourse.

Mr. Phillipson in his careful monograph on "The Effect of War on Contracts," p. 74 (London, 1909), cites the rule in the United States, and says that a contrary opinion is expressed by English writers, citing Anson on Contracts, p. 120, Lindley, vol. 1, p. 53, Pollock on Contracts, p. 92. These are names of high authority, but Mr. Phillipson adds:

"The only English case relating to this matter is *De Wahl* v. *Braune* (25 L. J. N. S. Ex. 343), where a married woman, whose husband was a domiciled enemy in Russia, claimed a right to sue for debt as a *feme sole*, on the ground that on his return he would be barred by the Statute. Lord Bramwell held that 'the inconvenient operation of the Statute of Limitations is no answer and does not take the case out of the general rule.'"

Mr. Phillipson adds:

"This is only an *obiter dictum* and it is conceived that the American doctrine, which is more reasonable and more conformable to justice and fairness, would now be followed in England."

It must be added that there seems some error in the reference by Mr. Phillipson to the three eminent English law writers as holding a contrary opinion. They have been consulted, and no such adverse opinion found as he indicates.

It is submitted that the authorities seem to establish that the Statute of Limitations will not run:

1. When parties are so divided by the line of war that the plaintiff cannot have access to the court.

[23] See BORDWELL, LAW OF WAR, p. 210.

[24] See as to the latter, Tucker *v.* Watson, 6 AM. L. REG. N. S. 220 (1866), holding as to interest that it did not accrue even where the enemy was in neutral territory.

2. When the court to which the plaintiff has a right to have recourse does not sit on account of the disorder of war.

It is submitted that the later rule announced in the courts of the United States is founded on reason and justice, and is consonant with the development of international law as to private rights and contracts, its tendency being to protect and preserve them if possible, only suspending the exercise of any rights, while war is flagrant, which are in their exercise incompatible with the necessities of the situation.

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